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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTON GEISER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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November 17, 2008

QUESTIONS PRESENTED

1. Did the Third Circuit err in holding that this Court through its *Chevron* jurisprudence has "altered" the "approach" to statutory interpretation prescribed by *Fedorenko v. United States*, 449 U.S. 490 (1981), so as to prohibit consideration at Step 1 of evidence regarding the State Department's interpretation of an immigration statute?

2. Where a visa was issued in accordance with a "uniform interpretation" of an immigration statute developed by the State Department pursuant to the express delegation of authority contained in Section 104 of the Immigration and Nationality Act ("INA"), may a court some fifty years later disregard that interpretation and deem the visa to have been "illegally procured" in violation of INA § 340(a)?

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DECISIONS ENTERED IN CASE

United States v. Geiser, 2006 WL 2847423 (W.D. Pa. Sept. 29, 2006), *aff'd*, 527 F.3d 288 (3d Cir. 2008).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the judgment and opinion entered by the Third Circuit on June 10, 2008, as to which the Third Circuit denied the petition for rehearing and rehearing en banc on August 20, 2008. The Petition is timely under Supreme Court Rules 13(1) and 13(3).

PERTINENT STATUTES AND REGULATION

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, Ch. 477, 66 Stat 1009, *codified as amended*, 8 U.S.C. § 1001 *et seq.* ("INA").

Sec. 104(e):

> There shall be a General Counsel of the Visa Office . . . . The General Counsel shall have authority to maintain liaison with the appropriate officers of the Service with a view to securing uniform interpretations of the provisions of this Act.

Sec. 340(a):

> It shall be the duty of the United States attorneys for the respective districts . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, *amended by*, Pub. L. No. 83-751, 68 Stat. 1053 (1954) ("RRA").

Sec. 7(b):

> Any alien admitted under this Act and subsequently determined to have been inadmissible under the provisions of this Act at the time of entry shall, irrespective of the date of his entry, be taken into custody and deported . . . .

Sec. 11(c):

> No person shall be issued a visa . . . under this Act unless . . . the applicant has established his eligibility for a visa . . . under this Act and under the immigration laws and regulations . . . .

Sec. 14(a):

> No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.

8 C.F.R. § 42.42(j)(2) (1953):

> An alien who was convicted of being a war criminal, or who was properly charged as such but who escaped trial or punishment by departing the jurisdiction, or an alien who was guilty of, or who advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of a power which was at war with the United States during World War II may be considered ineligible to receive a visa under the provisions of section 212(a)(29) of the act.

STATEMENT OF THE CASE

The United States commenced this action on August 9, 2004, by filing a single count complaint seeking denaturalization of Petitioner Anton Geiser. The Complaint does not allege that Geiser procured his citizenship by "concealment of a material fact or by wilfull misrepresentation," in violation of INA § 340(a). Instead, the Complaint alleges that, strictly

by virtue of his status as a former concentration camp guard, Geiser was "legally ineligible to receive a visa to enter the United States under RRA Section 14(a)," Complaint ¶ 32, and therefore was legally ineligible to naturalize pursuant to INA § 316(a). Complaint ¶¶ 33 & 34. According to the government, Geiser's "citizenship thus was illegally procured and must be revoked, as provided in INA Section 340(a) . . . ." Complaint ¶ 35.

The parties filed cross motions for summary judgment. The United States District Court for the Western District of Pennsylvania granted the government's motion for summary judgment and denied Geiser's motion for summary judgment. The district court held that Section 14(a) of the RRA unambiguously prohibited the issuance of an RRA visa to any former concentration camp guard. *Geiser*, 2006 W.L. 2847423 at * 6. Based on its reading of Section 14(a), the district court held that the case must be decided at *Chevron* "Step 1" and declined either to accord deference to the "State Department's decisions to grant visas to former concentration camp guards" or to "reach Geiser's contention that the State Department had in fact adopted a policy of granting visas to former Nazi concentration camp guards who were not war criminals." *Geiser*, 2006 WL 2847423 at * 6.[1] The district court quoted with

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[1] While a Judge of the United States Court of Appeals for the Third Circuit, Justice Alito outlined the methodology prescribed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> Chevron applies when "'it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *United States v. Mead Corp.*, 553 U.S. 218, 226

approval the Eighth Circuit's observation that an "'*ultra vires* agency decision to grant [a former concentration camp guard] a visa is due no deference." *Id.* (*quoting United States v. Friederich*, 402 F.3d 842, 846 n. 5 (8th Cir. 2005)).

The Third Circuit affirmed. 527 F.3d at 299. The Court of Appeals rejected Geiser's argument that RRA § 14(a) was textually ambiguous. The court reasoned that the terms "personally" and "persecution" as used in Section 14(a) of the RRA are unambiguous. *Geiser*, 527 F.3d at 288.[2]

Geiser also argued that, in light of the provisions of the RRA incorporating by reference the INA and its regulations, *see* RRA §§ 11(b), 11(c) & 15, the RRA could be deemed to be structurally ambiguous. Geiser proffered an alternative reading of the statutory scheme under which the phrase "personally advocated or

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(2001). If Chevron applies, a court must ask (at what is customarily called step one) "whether Congress has so directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If so, courts, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.'" *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004) (*quoting Chevron*, 467 U.S. at 842-43). "However, whenever Congress has 'explicitly left a gap for the agency to fill,'" a court must proceed to step two, and "the agency's [interpretation] is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" (*quoting Chevron*, 467 U.S. at 843-44). The Court has described this test as one of reasonableness. See Chevron, 467 U.S. at 845, 865, 866.

Chen v. Ashcroft, 381 F.3d 221, 223-24 (3d Cir. 2004) (parallel citations omitted).

[2] The district court had federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345 & 1451(a). The Third Circuit had subject matter jurisdiction pursuant to 28 U.S.C. § 1291. *See* Sup. Ct. R. 14(g)(ii).

assisted in the persecution" as used in RRA § 14(a) could be deemed to be synonymous with the phrase "war criminal, or [person] who was properly charged as such but who escaped trial or punishment by departing the jurisdiction, or an alien who was guilty of, or who advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of a power which was as war with the United States during World War II" as used in the 8 C.F.R. § 42.42(j)(2) (1953).

The Third Circuit rejected Geiser's proposed reading because, in the court's view, "the most natural reading" of the word "and" as used in RRA § 11(c) is in its "plain conjunctive sense." *Geiser*, 527 F.3d at 298. According to the Third Circuit the word "and" in RRA § 11(c) "signifies that applicants such as Geiser had to satisfy two sets of requirements: those of the INA (and its associated regulations) and those of the RRA." *Geiser*, 527 F.3d at 298.

The Third Circuit also rejected Geiser's argument that *Fedorenko v. United States*, 449 U.S. 490 (1981), required consideration of evidence regarding the interpretation of the RRA employed by the State Department during the mid-1950s when it issued Geiser's visa. *Geiser*, 527 F.3d at 293. The Third Circuit explained: "Even if *Fedorenko* did consider legislative history when initially construing the statute's meaning, this approach was altered by the Supreme Court's *Chevron* jurisprudence which now controls our analysis of the RRA." 527 F.3d at 293.

The Third Circuit subsequently denied Geiser's petition for rehearing and rehearing en banc. Circuit Judge Roth, a member of the original three judge panel, limited her vote on the petition to "panel rehearing only." Appendix C at 39a.

REASONS FOR GRANTING THE PETITION

The tension between the Third Circuit's present interpretation of the RRA and the available evidence regarding the State Department's historical interpretation generates novel and important federal issues. These issues justify the granting of certiorari pursuant to Supreme Court Rule 10(c).

1. The Third Circuit Erred by Failing To Consider the Range of Interpretations Available to the State Department in the Exercise of its Interpretive Authority Under INA § 104

The central flaw in the Third Circuit's reasoning is its failure to consider INA § 104 as part of its Step 1 analysis.[3] The existence of such a sweeping express delegation of interpretive authority sets out Congress's intent as to the appropriate role of the State Department. *See United States v. Morton*, 467 U.S. 822, 834 (1984); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981). *See also Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2008).

Once INA § 104 is considered as part of the RRA statutory framework, it is clear that the process of State Department "interpretation" is as much a part of that framework as RRA § 14(a) itself. The statutory scheme contemplates not that a court will years after the fact determine the "most natural reading," *Geiser*, 527 F.3d at 298, but instead grants the State Department authority to develop "interpretations,"

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[3] The Third Circuit's opinion contains a single reference to Section 104, 527 F.3d at 298, but offers no substantive discussion of that provision. The context suggests that this reference in the opinion was a typographical error.

INA § 104(e), to be applied "at the time of entry." RRA § 7(b).

In order to proceed to Step 2, Geiser need only show that his proposed interpretation of the statutory scheme is "within the bounds of reason." *National Cable & Telecommunications Association v. Brand X Internet Services, Inc.*, 545 U.S. 967, 983 (2005) ("*NCTA*"). Geiser's proposed reading of the statutory scheme, under which RRA § 14(a) would be deemed to be synonymous with 8 C.F.R. § 42.42(j)(2) (1953), is at least "within the bounds of reason." While this may not in the Third Circuit's view be the "most natural reading," *Geiser*, 527 F.3d at 298, it is at least a "reasonable" and "ordinary" usage, *NCTA*, 545 U.S. at 988, particularly when considered in light of INA § 104(e) and the sweeping deference normally accorded to the Executive Branch in relation to immigration matters.[4]

That Geiser's proffered interpretation is "within the bounds of reason," *NCTA*, 545 U.S. at 988, is strongly supported by the available historical evidence regarding the interpretation actually developed by the State Department in the mid-1950s. None of this evidence has even been considered because the district court and the Third Circuit have declined to examine the historical record. Just as the *Fedorenko* court faulted the district court for ignoring the

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[4] *E.g.*, *Kleindienst v. Mandell*, 408 U.S. 753, 768 (1972). *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)(*Chevron* deference owed to Board of Immigration Appeals interpretation of serious nonpolitical crime exception to statute otherwise granting withholding of deportation to alien facing risk of persecution; "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'") (citation omitted).

"uncontroverted testimony about how the Act was interpreted by the officials who administered it," *Fedorenko*, 449 U.S. at 749-50, the courts below have decided this case without considering the available evidence concerning the State Department's contemporaneous interpretation of the RRA.

2. The Third Circuit Erred in Holding that this Court has "Altered" the *Fedorenko* "Approach"

The Third Circuit's suggestion that *Chevron* superceded *Fedorenko* is not persuasive. *Geiser*, 527 F.3d at 293. *Chevron* did not announce an entirely new set of rules of statutory construction but instead relied in part on cases pre-dating *Fedorenko*. *Chevron*, 467 U.S. at 842-43 & n.9. In *Fedorenko* the Court found the meaning of the Displaced Persons Act of 1948, Pub. Law No. 80-774, Ch. 647, 62 Stat. 1009 ("DPA") to be "plain" but nonetheless deemed it entirely appropriate to discuss the State Department's interpretation of the DPA as part of its analysis as to whether the guard in that case was eligible for a DPA visa. *Fedorenko*, 449 U.S. 513-14. Nothing in *Chevron* indicates that this approach does not continue to be valid.

The more recent *Chevron* decisions cited by the Third Circuit, *Geiser,* 527 F.3d at 288, do not support the Third Circuit's conclusion that the Court has "altered" the "approach" followed in *Fedorenko*. The cited cases stand only for the proposition that an agency may not overturn a clear directive from Congress. But these cases also hold that where a congressional mandate for agency interpretation is to be found, that mandate must be honored. Thus, in *Zuni Public School District No. 89 v. Department of Education,* 550 U.S. 81, 127 S. Ct. 1534 (2007), the

Court held that the "general language of the statute . . . leaves the Secretary with the authority to resolve such subsidiary matters at the administrative level." 127 S. Ct. at 1545.

The Third Circuit's approach is itself inconsistent with *Chevron*. The Court of Appeals reasoned that the RRA must impose a higher standard than the INA because Congress used the word "and" rather than "or" in RRA § 11(c). *Geiser*, 527 F.3d at 298. Even the decision relied upon by the Third Circuit on this point recognizes that that this rule is merely a presumption and does not control if "'the context dictates otherwise.'" *Id.* (quoting *Reese Brothers, Inc. v. United States*, 447 F.3d 229, 236 (3d Cir. 2006)). Here the "context," that is, the entire statutory scheme including INA § 104 and the interpretive role of the State Department recognized in *Fedorenko*, argues strongly against application of a presumption that operates to prevent consideration of potential interpretations within the "bounds of reason." *NCTA*, 545 U.S. at 983.

Particularly in light of INA § 104, the Court of Appeals should have explored all available readings of the statute within the "bounds of reason" with due consideration as to whether the proffered interpretation was the agency's interpretation. Such an approach is routine even in cases decided at *Chevron* Step 1. *See Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 131 (2002) (discussing agency's "convincing explanation" of statute determined to have "plain" meaning).

The Third Circuit has as a practical matter read the State Department's interpretive authority out of the statute by limiting its Step 1 analysis to the one statutory reading it deemed "most natural." The

"most natural" standard amounts to a reasonableness analysis, which should only be conducted at Step 2. Such an approach by no means eliminates a court's ability to overturn an interpretation if it is deemed to be unreasonable, but this analysis should be conducted at Step 2 in the context of the complete historical record.

3. The Third Circuit's Decision Results in an Untenable Definition of the Term "Illegally Procured" in INA § 340(a)

This Court has on a few occasions alluded to the possibility that a visa might be deemed to have been "illegally procured" in the absence of any claim of misrepresentation.[5] The Court has never even approached the Third Circuit's holding that a court may retroactively deem a visa to have been unlawfully procured notwithstanding evidence of a contemporaneous State Department "policy" authorizing issuance of the visa. *Geiser*, 527 F.3d at 294.

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[5] *See, e.g., Schneiderman v. United States*, 320 U.S. 118 (1943) (reversing order of denaturalization based on alleged "unlawful procurement" without misrepresentation based on government's inability to prove beyond a reasonable doubt that citizen was not attached to principles of Constitution at time of naturalization.) *See also Kungys v. United States*, 485 U.S. 759, 799 & n.11 (1988) (concurring opinion of Stevens, J.) (discussing relationship between "misrepresentation and illegally procured clauses" of INA § 340(a)). *See generally* Gordon, Mailman, & Yale-Loehr, 7 Immigration Law and Procedure § 96.10[3], at 96-45 (2004) ("Prevailing judicial and administrative attitudes make it unlikely that a denaturalization suit will ordinarily be brought on a charge of illegal procurement unless it is coupled with a charge of concealment or misrepresentation.").

The Third Circuit's decision leads to an untenable reading of the term "illegally procured" in INA § 340(a). Under the Third Circuit's analysis, a court could deem an alien to have "illegally procured" a visa even though the General Counsel of the Visa Office and the other members of the Foreign Service had at the time of its issuance "secur[ed]" a "uniform interpretation," INA § 104(e), providing that the alien was legally eligible for the visa. Such a reading defies common sense and is inconsistent with RRA § 7(b), which provides that visa eligibility is to be determined "at the time of entry."

CONCLUSION

The Third,[6] Seventh[7] and Eighth[8] Circuits have now each assumed the power of a court to ignore and, in effect, reverse the State Department's "policy." These courts have arrived at this facially implausible result under the theory that the State Department's policy was either "*ultra vires*" or irrelevant in light of *Chevron*. Each of these decisions – unique to the context of concentration camp guards granted RRA visas – is flawed because it fails to respect the State Department's established and statutorily-mandated authority to render "interpretations" of the immigration laws. INA § 104(e). This authority was respected in *Fedorenko* and should be respected here.

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[6] The Third Circuit noted that application of the RRA presented an issue of "first impression" in the Third Circuit. *Geiser*, 527 F.3d at 297.

[7] *United States v. Kumpf*, 438 F.3d 785 (7th Cir. 2006).

[8] *United States v. Hansl*, 439 F.3d 850 (8th Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 318 (2006); *United States v. Friederich*, 402 F.3d 842 (8th Cir. 2005), *cert. denied*, 546 U.S. 961, *reh. denied*, ___ U.S. ___, 127 S. Ct. 318 (2006).

This Court should grant certiorari in order to address the several important federal questions raised by this line of erroneous decisions.

Respectfully submitted,

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November 17, 2008

APPENDIX A

UNITED STATES DISTRICT COURT,
W.D. PENNSYLVANIA

No. 2:04cv1184.

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTON GEISER,
Defendant.

Sept. 29, 2006.

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MEMORANDUM OPINION

DAVID STEWART CERCONE, *District Judge*.

I. INTRODUCTION

Plaintiff, the United States of America (the "Government"), filed this action to revoke the naturalized citizenship of Defendant, Anton Geiser ("Geiser"), pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, ("INA"),

8 U.S.C. § 1451(a). The Government charges that Geiser procured American citizenship illegally by obtaining an immigration visa to which he was not entitled. Such lack of entitlement to enter the United States stemmed from his alleged service as a guard at Nazi concentration camps in Germany from 1943 to 1945. Geiser's naturalization was premised on his 1956 entry into the United States under the Refugee Relief Act of 1953 (the "RRA"), Pub.L. No. 83-203, 67 Stat. 400 (amended 1954). The parties have filed cross motions for summary judgment, and the matter is now before the Court.

I. STATEMENT OF THE CASE

Geiser was born on October 17, 1924, in Djak-Selci, Yugoslavia. Geiser's Concise Statement of Material Facts ("Geiser's CSMF") ¶ 1. Geiser worked on his family's farm in Yugoslavia until 1942, when he and his father received letters from the German government directing them to report to Satnica, Yugoslavia for a military physical. Geiser's CSMF ¶¶ 3 & 6. Geiser entered the Nazi Waffen SS on or around September 14, 1942. Geiser's CSMF ¶ 7. Certain units of the Waffen SS, known as the SS Death's Head battalions, were used to guard Nazi concentration camps. Government's Concise Statement of Material Facts ("Government's CSMF") ¶ 15.

In January of 1943, Geiser was transferred to the SS Death's Head battalion at Sachsenhausen Concentration Camp in Oranienberg, Germany, where he served as a guard. Geiser's CSMF ¶¶ 12 & 13; Government's CSMF III 48. As an armed guard at Sachsenhausen, Geiser rotated through duties such as guarding the perimeter, escorting prisoners to work sites, and standing guard in the camp's guard

towers. Geiser's CSMF ¶ 14; Government's CSMF ¶¶ 53 & 54.

In November of 1943, Geiser and twelve (12) other SS guards were ordered to Buchenwald Concentration Camp to transport prisoner from Buchenwald to Aroisen, a subcamp of Buchenwald. Geiser's CSMF ¶ 16; Government's CSMF ¶ 94. At Arolsen, Geiser was an armed guard with duties that included guarding the camp's perimeter and escorting prisoners to and from work sites. Geiser's CSMF ¶ 18; Government's CSMF ¶¶ 96 & 97. At the end of March of 1945, as the Allied forces were closing in on Arolsen, Geiser and the other guards were ordered to evacuate the prisoners from Arolsen to Buchenwald. Geiser's CSMF ¶ 18; Government's CSMF ¶¶ 96 & 97. Geiser returned to Buchenwald, but quickly left the camp as Allied forces advanced toward Buchenwald. Geiser's CSMF ¶ 24.

Geiser traveled on foot to Volknnarsen, Germany, where he remained until 1948. Geiser's CSMF ¶ 27. In the fall of 1948, Geiser moved to Voecklabruck, Austria, to live with his future wife. Geiser's CSMF ¶ 28. In August 1956, in Salzburg, Austria, Geiser applied for an immigration visa to enter the United States under the Refugee Relief Act of 1953, Pub.L. No. 203, 67 Stat. 400 (amended 1954) ("RRA"). Government's CSMF ¶ 112. The application lists his name as "Anton Geisser." *Id.* An immigrant visa was issued to Geiser on August 23, 1956. Government's CSMF ¶ 113. Geiser then entered the United States on or about October 28,1956. Geiser's CSMF ¶ 34; Government's CSMF ¶ 114.

On October 14, 1961, Geiser filed an application for naturalization as a United States citizen under the name "Anton Geisser." Government's CSMF ¶ 115.

Geiser filed a petition for naturalization with the Court of Common Pleas of Mercer County, Pennsylvania on January 23, 1962. Government's CSMF ¶ 116. In the petition, Geiser requested that his name be changed from "Anton Geisser" to "Anton Geiser." *Id.* Geisser was naturalized by the court on March 27, 1962, and received Certificate of Naturalization No. 8058860. Geiser's CSMF ¶ 35; Government's CSMF ¶ 117.

By performing his duties as a guard, the Government contends that Defendant personally assisted the Nazi Government in persecuting persons because of race, religion or national origin. Geiser's service as an armed guard at the concentration camps rendered him ineligible for the immigration visa, and his entry into the United States was illegal. Therefore, the Government argues that Geiser's naturalization was unlawful, and his citizenship must be revoked.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to FED. R. CIV. P 56(c), summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. To support denial of summary judgment, an issue of fact in dispute must be both genuine and material, *i.e.*, one upon which a reasonable fact finder could base a verdict for the non-moving party and one which is essential to establishing the claim. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, the court is not permitted to weigh the evidence or to make credibility determinations, but is limited to deciding whether there are any disputed issues and, if there are, whether they are both genuine and material. *Id.*

The court's consideration of the facts must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. *Whiteland Woods, L.P. v. Township of West Whiteland,* 193 F.3d 177, 180 (3d Cir.1999), *Tigg Corp. v. Dow Corning Corp.,* 822 F.2d 358, 361 (3d Cir.1987).

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P 56(e). Further, the nonmoving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. *Williams v. Borough of W. Chester,* 891 F.2d 458, 460 (3d Cir.1989) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)). The non-moving party must respond "by pointing to sufficient cognizable evidence to create material issues of fact concerning every element as to which the non-moving party will bear the burden of proof at trial." *Simpson v. Kay Jewelers, Div. Of Sterling, Inc.,* 142 F.3d 639, 643 n. 3 (3d Cir.1998), *quoting Fuentes v. Perskie,* 32 F.3d 759, 762 n. 1 (3d Cir.1994).

The Government, however, "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." *Fedorenko v. United States,* 449 U.S. 490, 505 (1981) (quoting *Costello v. United States,* 365 U.S. 265, 269 (19611); *see also United States v. Szehinskyj,* 277 F.3d 331, 336 (3d Cir.2002). The evidence for revocation must be "clear, unequivo-

cal, and convincing" and not leave "the issue in doubt." *Fedorenko v. United States,* 449 U.S. at 505 (quoting *Schneiderman v. United States,* 320 U.S. 118, 125 (1943)).

IV. DISCUSSION

A condition precedent to lawful naturalization is that the would-be citizen resided continuously in this country for at least five years after having been "lawfully admitted to the United States for permanent residence." 8 U.S.C. § 1427(a)(1). To be lawful, admission to the United States must have been undertaken pursuant to a valid immigration visa. See *Fedorenko v. United States,* 449 U.S. at 515; *United States v. Koreh,* 59 F.3d 431, 438 (3d Cir.1995).

The INA imposes upon the government the duty to bring a civil action against a naturalized citizen "for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a). Denaturalization, therefore, is mandated for a person whose citizenship was obtained by unlawful means. *See Fedorenko v. United States,* 449 U.S. at 517 ("Once a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally . . . it has no discretion to excuse the conduct."); *United States v. Koreh,* 59 F.3d at 438. Geiser was admitted for permanent residence based on a visa issued under the RRA. To ascertain whether Geiser "illegally procured" his order and

certificate of naturalization, we must evaluate the validity of his visa.

After World War II, the United States provided for expedited immigration under the Displaced Persons Act of 1948 ("DPA"), Pub.L. No. 80-774, Ch. 647, 62 Stat. 1009, amended by Pub.L. No. 81-555, Ch. 262, 64 Stat. 219 (1950). One of the restrictions under the DPA, however, was that "no visas shall be issued under the provisions of this Act . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin[1]." Pub.L. No. 81-555, Ch. 262, 64 Stat. 219, § 13; *See also Fedorenko v. United States,* 449 U.S. at 510. In 1953, Congress passed the RRA, the Act under which Geiser obtained his visa. Similar to the DPA, Section 14(a) of the RRA provides: "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." Pub.L. No. 83-203 § 14(a), 67 Stat. 400. The RRA added the word "personally," thus narrowing the class of potential immigrants who could be excluded based on their assistance in persecution. *See United States v. Friedrich,* 402 F.3d 842, 845 (8th Cir.2005) (citing *United States v. Lileikis,* 929 F.Supp.

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[1] In *Szehinskyj,* the Third Circuit made explicit that the assistance in persecution ground for visa ineligibility was an independent ground that did not include a fraud element. *United States v. Szehinskyj,* 277 F.3d 331, 334 (3d Cir.2002). Therefore, once a determination of ineligibility is made on this ground, there is no need to look for and find a material misrepresentation. *Id.; United States v. Tittjung,* 235 F.3d 330, 341 (7th Cir.2000); *cf. United States v. Breyer,* 41 F.3d 884, 889-891 (3d Cir.1994)(finding ineligibility without examining whether any misrepresentation occurred); *Koreh,* 59 F.3d at 438-42 (same).

31, 38-39 (D.Mass.1996)). Thus, Geiser was not eligible for his visa if, prior to obtaining the visa, he had personally advocated or assisted in persecution based on race, religion, or national origin.

Geiser, however, argues that the Third Circuit's decision in *Chen v. Ashcroft,* 381 F.3d 221 (3d Cir. 2004), establishes that the term "persecution" as used in the RRA is ambiguous. Therefore, under the administrative law principles announced by the Supreme Court in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837 (1984), this Court is required to defer to the State Department's alleged policy of granting RRA visas to former concentration camp guards who were not war criminals. For the reasons set forth below, the Court finds that neither *Chen* nor *Chevron* are applicable to the instant action.

An administrative policy must be given deference under *Chevron* when:

> "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.,* 533 U.S. 218, 226-27, 150 L.Ed.2d 292, 121 S.Ct. 2164 (2001). If *Chevron* applies, a court must ask (at what is customarily called step one) "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. "If so, courts, as well as the agency, `must give effect to the unambiguously expressed intent of Congress.'" *Household Credit Servs, Inc. v. Pfennig,* 541 U.S. 232, 158 L.Ed.2d 450, 124 S.Ct. 1741, 1747 (2004) (quoting *Chevron,* 467 U.S. at 842-43). "However, whenever Congress

> has 'explicitly left a gap for the agency to fill,'" a court must proceed to step two, and "the agency's [interpretation] is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (second brackets in original) (quoting *Chevron,* 467 U.S. at 843-44). The Court has described this test as one of reasonableness. *See Chevron* 467 U.S. at 845, 865, 866.
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> *Chen v. Ashcroft,* 381 F.3d at 223-224. In *Chen,* the court was called upon to review an order of the Board of Immigration Appeals (BIA) affirming the denial of plaintiff's application for asylum under 8 U.S.C. § 1101(a)(42) based on the forced abortion of plaintiff's fiance by Chinese officials. *Id.* at 222. Plaintiff did not contend that 8 U.S.C. § 1101(a)(42) unambiguously covered the unmarried partners of persons who have undergone forced abortions or sterilization, but instead focused on step two of the *Chevron* analysis and argued that it was irrational for the BIA to apply the statute to permit asylum for spouses of victims of forced abortions but not for unmarried partners of such victims. *Id.* at 224.

In finding that the BIA acted reasonably, the court stated:

> with the exception of forced abortions and sterilizations, the concept of "persecution" is left completely undefined. We infer from Congress's use of this ambiguous term an intent to delegate interpretive authority to the agency, including the ability to decide, within a reasonable range, the precise contours of its meaning.

Id. at 232. This was not a determination that "persecution" was ambiguous as it applied to the intense

suffering by one spouse resulting from a forced abortion or sterilization of the other spouse. The court merely made an inference from the use of the term in determining whether Congress' intent in amending § 1101(a)(42) was to afford relief to every person who was a victim of any rule or practice that was part of the Chinese population control program. *Id.* As such, the inference has no application in this instance.

More applicable to the instant case, is the Third Circuit's ruling in *Szehinskvj v. AG of the United States,* 432 F.3d 253 (3d Cir.2005). There, the issue before the court was whether the statutory language "assisted in persecution" meant the same thing in the Displaced Persons Act of 1948 and the Holtzman Amendment of 1978[2]. *Szehinskyj v. AG of the United States,* 432 F.3d at 254. In this case, the Government had charged that Szehinskyj had been a prison guard at several concentration camps and a member of the Waffen SS, a special army unit in charge of the concentration camps. The district court found that: (1) Szehinskyj had been a concentration camp guard and an SS member: (2) had assisted in persecution; and (3) he was ineligible for entry under the DPA. *United States v. Szehinskyj,* 104 F.Supp.2d 480 499 E.D.Pa.2000). After Szehinskyj had exhausted his appeals, *see United States v. Szehinskyj,* 277 F.3d 331 (3d Cir.2002), the Government instituted removal

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[2] The Holtzman Amendment, Pub.L. No. 95-549, 92 Stat.2065 (1978), provides for the exclusion and removal of any alien "who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with [Nazi Germany or its allies] ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. . . ." 8 U.S.C. § 1182(a)(3)(E).

proceedings under the Holtzman Amendment. *Szehinskvj v. AG of the United States,* 432 F.3d at 254.

In rejecting Szehinskyj's argument that Congress's intent was that only "war criminals" would be covered by the statutory language, and not-the words of the text notwithstanding-all those who assisted in Nazi persecution, the court made the specific finding that "the statutory language [was] not ambiguous." *Szehinskyj v. AG of the United States,* 432 F.3d at 256. The relevant language at issue, "assisted in persecution," was precisely the same in the Holtzman Amendment as in the provision of the DPA at issue in Szehinskyj's denaturalization trial.

The RRA was passed by Congress in 1953, and in pertinent part, provides:

> No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.

Pub.L. No. 83-203 § 14(a), 67 Stat. 400. The DPA and the RRA are parallel statutes. Congress added the word "personally" to the RRA in order to narrow the class of potential immigrants who could be excluded based on their "assistance in persecution" rather than on the mere membership in an organization. *See United States v. Friedrich,* 402 F.3d 842, 845 (8th Cir.2005) (citing *United States v. Lileikis,* 929 F. Supp. 31, 38-39 (D.Mass.1996)). The terms "assisted in persecution" as used in the DPA, RRA and Holtzman Amendment have the same meaning and are not ambiguous. Therefore, Geiser's contention that the Third Circuit has already made a determination regarding the ambiguity of the term "persecution" as used in the RFtA is without merit.

Further, Geiser is unable to direct this Court to even one application of *Chevron* to a denaturalization of a person whose visa was found to have been invalid when issued under either the DPA or the RRA. Such application has been specifically rejected, however, by the Courts of Appeals for both the Seventh Circuit and the Eighth Circuit. In finding that a concentration camp guard personally assisted in the persecution that occurred in those camps and was thus ineligible for a visa under the RRA, the Seventh Circuit specifically stated "[t]he statute is not ambiguous, and therefore we do not need to address the agency's construction of the statute [pursuant to *Chevron*]." *United States v. Kumpf,* 438 F.3d 785, 790 (7th Cir.2006).

In *United States v. Friedrich,* 402 F.3d 842 (8th Cir.2005), a denaturalization action involving a concentration camp guard who obtained a visa under the RRA, the defendant argued that the court was required to provide deference to the 1955 State Department decision to grant him a visa under *Chevron. United States v. Friedrich,* 402 F.3d at 846. In rejecting defendant's argument the court stated:

> Under *Chevron, we* must first consider whether Congress has directly spoken to the precise question at issue. Because we have concluded that Congress intended the RRA to prohibit the State Department from granting a visa to an armed Death's Head concentration camp guard, the *ultra vires* agency decision to grant Friedrich a visa is due no deference.

United States v. Friedrich, 402 F.3d 846 n. 5.

Similarly, this Court finds that the relevant language of the RRA at issue here is not ambiguous, and

no deference will be given to the State Department's decisions to grant visas to former concentration camp guards. Therefore, the Court does not reach Geiser's contention that the State Department had in fact adopted a policy of granting RRA visas to former Nazi concentration camp guards who were not war criminals.

Geiser also makes a vague reference to consideration by the State Department of whether a guard's service was voluntary or involuntary in evaluating their admissibility into the United States. The Refugee Relief Act, however, does not require a person to assist voluntarily in persecution. In the context of the DPA, courts have held that the voluntariness of the service is irrelevant. *Fedorenko v. United States,* 449 U.S. at 513 ("an individual's service as a concentration camp armed guard—whether voluntary or involuntary-made him ineligible for a visa."); *United States v. Wittje,* 422 F.3d 479, 489 (7th Cir.2005) ("there is no voluntariness requirement in the plain language" of the Displaced Persons Act). Similarly, the plain language of the Refugee Relief Act does not provide for a consideration of voluntariness in assessing whether an individual personally assisted in persecution. *See United States v. Kumpf,* 438 F.3d at 790-791.

The sole remaining issue is whether Geiser's particular actions as a guard constituted "personal" assistance in persecution under the RRA. In *Fedorenko,* the Supreme Court described conduct that would satisfy the broader "assisting in persecution" under the DPA stating:

> an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecu-

> tion of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Fedorenko v. United States, 449 U.S. at 512 n. 34. Thus, an armed guard who took direct action against prisoners unquestionably assisted in persecution. It is undisputed that persecution occurred at the locations where Geiser served.

The parameters of the RRA are not limited to personal affirmative acts causing harm to individuals. The language of the RRA instead addresses personal assistance. *United States v. Kumpf,* 438 F.3d at 790. Here, Geiser was a guard who was issued a uniform, armed with a rifle, received wages, and took leave to visit home. He admits to standing guard over prisoners at Sachsenhausen, Buchenwald and Arolsen. He also admits to receiving orders to shoot escaping prisoners, although he never did so. Nevertheless, his personal presence as an armed guard clearly assisted in the persecution of the prisoners. As the Eighth Circuit explained, "the pertinent question is [ ] whether Friedrich 'personally assisted' on persecution, not whether he engaged in direct persecution." *See United States v. Friedrich,* 402 F.3d at 845. The court further concluded that "by guarding the perimeter of the [ ] concentration camps to ensure that

prisoners did not escape from these unspeakable conditions, Friedrich personally assisted in the persecution that occurred in those camps." *Id.* at 846.

The facts of *Friedrich* are very similar to those in Geiser's case. Friedrich, an ethnic German born in Romania, joined the Waffen SS in October 1942. *United States v. Friedrich*, 305 F.Supp.2d 1101, 1103 (E.D.Mo.2004). After completing basic training, Friedrich was assigned to the Death's Head unit at the Gross-Rosen concentration camp, and later was assigned to the Dyhenfurth concentration camp. *Id.* Friedrich's duties as a Death's Head guard were to guard the perimeter of the camp, escort work-details to forced labor sites and guard the prisoners while they worked, and to escort prisoners from one concentration camp to another. *Id.* Like Geiser, Friedrich was under orders to shoot any prisoners who attempted to escape. *Id.* After Allied troops overtook the German forces, Friedrich lived in Austria for several years, and eventually applied for a visa to the United States. *Id.* His visa application stated that he was in the German Army from 1942 to 1945, but made no mention of his Waffen SS service or of his duties as a concentration camp guard. *Id.* Friedrich was granted a visa under the RRA, entered the United States, and was eventually naturalized on May 4, 1962. *Id.* After learning of Friedrich's involvement with the SS, the United States sought to revoke his citizenship under the INA. In granting summary judgment to the Government and revoking Friedrich's citizenship, the district court concluded: "Friedrich's service, even in the absence of any evidence that he personally committed atrocities against these individuals, qualifies as 'advocating or assisting in persecution.'" *United States v. Friedrich*, 305 F.Supp.

2d at 1107 (citing *United States v. Szehinskyj*, 277 F.3d 331, 339 (3d Cir.2002)).

Similarly, courts across the country have granted summary judgment on denaturalization involving concentration camp guards based upon the DPA, the RRA and on the Holtzman Amendment. *See e.g., United States v. Breyer*, 41 F.3d 884, 888 (3d Cir. 1994)(Breyer was excluded under the DPA from obtaining a visa because of his SS Totenkopf guard service at Buchenwald and Auschwitz); *United States v. Negele*, 222 F.3d 443, 447-448 (8th Cir.2000) (service in Waffen SS Death's Head guard unit at Sachsenhausen concentration camp and Theresienstadt internment camp, was membership and participation in movement hostile to United States within meaning of DPA); *Tittjung v. Reno*, 199 F.3d 393, 398 (7th Cir.1999) (concluding service as an armed SS Death's Head Battalion concentration camp guard constituted assisting in persecution within the meaning of the Holtzman Amendment); *Hammer v. INS*, 195 F.3d 836, 843 (6th Cir.1999) (upholding a removal order against a former SS Death's Head Battalion guard under the Holtzman Amendment); *United States v. Schmidt*, 923 F.2d 1253, 1257 (7th Cir.1991) (affirming order of denaturalization in case of armed guard in concentration camp and finding that such service was sufficient to establish that the guard "assisted in persecution" within the meaning of the DPA); *United States v. Hansl*, 364 F.Supp.2d 966 (S.D.Iowa 2005)(ineligible to receive a visa to enter the United States under the RRA because of his personal conduct while serving in the Death's Head Guard Battalion); *United States v. Wasylyk*, 162 F.Supp.2d 86, 93-94 (N. D.N.Y.2001) (holding that armed guard of concentration camp assisted the enemy in the persecution of civilians and was, there-

fore, ineligible for a visa under the DPA, regardless of whether he personally injured or killed anyone); *United States v. Hutyrczyk,* 803 F.Supp. 1001, 1009-10 (D.N. J 1992) (summary judgment proper because concentration camp guard assisted in the persecution of the camp's Jewish inmates within the meaning of the DPA).

In the instant action, the facts are undisputed, and similarly warrant summary judgment. Geiser admits that he served as an armed SS Death's Head guard at Sachsenhausen Concentration Camp for most of 1943. It is undisputed that while on duty at Sachsenhausen, Geiser guarded the camp's perimeter and was under standing orders to shoot any prisoner attempting to escape. Geiser admits that he escorted forced laborers to and from work sites and guarded prisoners from the watch tower. It is also admitted that Geiser served as an armed guard at both Buchenwald Concentration Camp and its Arolsen subcamp from November 1944 until April of 1945. At Buchenwald and Arolsen, Geiser was armed and under orders to shoot anyone attempting to escape. Geiser also escorted prisoners from Buchenwald to Arolsen, and later evacuated prisoners from Arolsen back to Buchenwald as Allied forces approached and the Germans decided to evacuate the subcamp.

Based upon these undisputed facts, as well as Geiser's admissions and sworn deposition testimony, the Court finds that he personally assisted in the persecution of people because of race, religion or national origin. Therefore, Geiser was statutorily ineligible to receive an immigrant visa under the RRA. Because an individual may not be naturalized unless he has first been lawfully admitted for permanent residence, citizenship founded on an invalid visa

amounts to illegal procurement. *See* 8 U.S.C. § 1427(a)(1). Pursuant to 8 U.S.C. § 1451(a), Geiser's citizenship must be revoked as a matter of law.

V. CONCLUSION

Based on the foregoing, there is no genuine issue of material fact, and the Government is entitled to judgment as a matter of law. Therefore, the motion for summary judgment filed by the Government shall be granted. Geiser's motion for summary judgment must be denied. Pursuant to 8 U.S.C. § 1451(a), Geiser's citizenship must be revoked as a matter of law.

An appropriate Order will follow.

APPENDIX B

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

No. 06-4406.

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTON GEISER,
Defendant.

Argued March 3, 2008.
Filed: June 10, 2008.

Valerie M. Antonette, Samuel J. Reich, Jay K. Reisinger, Reich, Alexander, Reisinger & Farrell, Adrian N. Roe (Argued), Watkins, Dulac & Roe, Pittsburgh, PA, Attorneys for Appellant.

Christina Giffin (Argued), Stephen J. Paskey, United States Department of Justice, Washington, DC, Attorneys for Appellee.

OPINION OF THE COURT

Before: SCIRICA, *Chief Judge*, FISHER and ROTH, *Circuit Judges.*

FISHER, *Circuit Judge.*

In this case, we must decide whether Anton Geiser, who served as an armed Nazi concentration camp guard, "personally advocated or assisted in the persecution of . . . [a] group of persons because of race,

religion, or national origin" and is thus ineligible for a visa under the Refugee Relief Act of 1953, Pub.L. No. 83-203 at § 14(a), 67 Stat. 400, 406 ("RRA"). For the reasons that follow, we conclude that Geiser "personally advocated or assisted in . . . persecution" and is ineligible for an RRA visa. Therefore, we will affirm the District Court's order granting the Government's motion for summary judgment and revoking Geiser's United States citizenship.

I. BACKGROUND

Anton Geiser, an ethnic German, was born in 1924 in a part of what was then Yugoslavia and is now Croatia. After German forces invaded Yugoslavia in 1941, Geiser was drafted into the Waffen Schutzstaffel ("SS"). The SS was the elite guard of the Nazi party, and the "Waffen" SS was the "Armed" SS. Certain units of the Waffen SS, the "Death's Head" battalions, were responsible for guarding concentration camps.

Geiser was chosen for a Death's Head battalion and sent to Sachsenhausen concentration camp near Oranienberg, Germany. Geiser received training in how to guard prisoners and was told that if a prisoner tried to escape, he should shoot the prisoner with his rifle or sidearm. He guarded the perimeter of the camp and escorted prisoners to and from labor sites. He also served at Buchenwald concentration camp near Weimar, Germany, as well as Arolsen, a subcamp of Buchenwald. Geiser admits that Sachsenhausen and Buchenwald were places of persecution.

When Allied forces approached, Geiser and his fellow guards fled. They obtained civilian clothing and buried their SS uniforms in the woods. After the war, Geiser worked in Germany and Austria. In

1956, he applied for a United States visa under the Immigration and Nationality Act of 1952 and the RRA. Geiser entered the United States in 1956 and was naturalized in the Court of Common Pleas of Mercer County, Pennsylvania, in 1962.

On April 9, 2004, the United States filed a complaint to revoke Geiser's citizenship in the United States District Court for the Western District of Pennsylvania. The complaint alleged that Geiser's service as an SS concentration camp guard rendered him ineligible for a visa under the RRA, which provides: "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." RRA § 14(a). Geiser and the Government filed cross motions for summary judgment.

The District Court rejected Geiser's argument that the term "persecution" in the RRA is ambiguous. Therefore, the Court concluded that *Chevron* deference, as outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), did not apply. Based on the undisputed facts, the Court granted the Government's motion for summary judgment and ordered Geiser's citizenship to be revoked.

Geiser filed this timely appeal. He argues that the term "persecution" is ambiguous, and he asks us to reverse and remand for consideration of the second step of the *Chevron* analysis.

II. DISCUSSION

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1345. We have jurisdiction under 28 U.S.C. § 1291. We have previously

explained our standard of review for an appeal from a grant of summary judgment:

> "We review a district court's grant of summary judgment de novo. Summary judgment is only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party."

Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 260 (3d Cir.2007) (citations omitted).

A. Applicable Statutes: the INA and the RRA

"[T]he Immigration and Nationality Act of 1952 . . ., 8 U.S.C. § 1451(a), requires revocation of United States citizenship that was illegally procured." *Fedorenko v. United States*, 449 U.S. 490, 493, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981) (internal quotation marks omitted). The legality of a naturalization "ultimately turns on" an alien's eligibility under the Act under which he was issued a visa. *United States v. Szehinskyj (Szehinskyj I)*, 277 F.3d 331, 334 (3d Cir.2002). Therefore, in order to determine whether Geiser's citizenship was illegally procured, we must examine whether he met the RRA's requirements.

The RRA was one of a series of post-World War II immigration statutes. "In 1948, Congress enacted the Displaced Persons Act . . ., [or DPA,] to enable European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas." *Fedorenko*, 449 U.S. at 495, 101 S.Ct. 737. "Section 13 of the [DPA] . . . states . . . : 'No visas shall be issued under the pro-

visions of this Act, as amended . . . to any person . . . who advocated or assisted in the persecution of any person because of race, religion or national origin.'" *Szehinskyj I*, 277 F.3d at 334. In 1953, Congress passed the RRA as a successor statute to the DPA. *United States v. Friedrich*, 402 F.3d 842, 844 (8th Cir. 2005). The RRA provides: "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." RRA § 14(a).

The RRA did not displace the then-existing immigration requirements under the Immigration and Nationality Act ("INA"). The RRA states: "No person shall be issued a visa . . . under [the RRA] unless . . . the applicant has established his eligibility for a visa and his admissibility into the United States under this Act and under the immigration laws and regulations." RRA § 11(c).

B. The Parameters of *Chevron* Step One Analysis

Geiser's appeal rests on his assertion that RRA § 14(a) is ambiguous because it uses the term "persecution." Geiser argues that because of the ambiguity, the District Court should not have stopped with its *Chevron* step one analysis, but should have proceeded to inquire at *Chevron* step two whether the State Department's interpretation of the RRA is reasonable.

We have explained *Chevron* analysis as follows:

> "*Chevron* applies when 'it appears that Congress delegated authority to . . . [an administrative] agency . . . to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of

> that authority.' *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). If *Chevron* applies, a court must ask (at what is customarily called step one) 'whether Congress has directly spoken to the precise question at issue.' *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. 'If so, courts, as well as the agency, "must give effect to the unambiguously expressed intent of Congress."' *Household Credit Servs. Inc. v. Pfennig*, 541 U.S. 232, [239], 158 L.Ed.2d 450 (2004) (quoting *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778). 'However, whenever Congress has "explicitly left a gap for the agency to fill,"' a court must proceed to step two, and 'the agency's [interpretation] is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."' *Id.* (second brackets in original) (quoting *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778). The Court has described this test as one of reasonableness. *See Chevron*, 467 U.S. at 845, 865, 866, 104 S.Ct. 2778."

Chen v. Ashcroft, 381 F.3d 221, 223-24 (3d Cir.2004) (parallel citations omitted).

Thus, at step one, the question is "whether Congress has directly spoken to the precise question at issue," *id.* at 224-whether serving as a concentration camp guard constitutes "personally advocat[ing] or assist[ing] in . . . persecution." RRA § 14(a). At step one, we consider the text and structure of the statute in question. *See Zheng v. Gonzales*, 422 F.3d 98, 120 (3d Cir. 2005. The parties dispute whether further analysis is required at *Chevron* step one. Geiser states that according to our case law, a court should refer to legislative history to confirm its step one statutory analysis. To support this proposition, he

cites *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 388 n. 3 (3d Cir.2005). The Government contends that if the statutory text is unambiguous, it is inappropriate and unnecessary to inquire into the legislative history at step one.

The Government is correct that legislative history should not be considered at *Chevron* step one. A closer look at Santiago and subsequent cases confirms this point. In Santiago, we stated:

> "It is not clear whether it is appropriate for us to consider legislative history to determine whether a statute is unambiguous at this point in *Chevron* analysis. Compare *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 137, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (considering legislative history at step one of *Chevron* analysis), with *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n. 4, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) (stating that 'any reference to legislative history . . . is in the first instance irrelevant' in step one of *Chevron* analysis) and *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (finding only statutory text is relevant for step one of *Chevron* analysis). However, it is worth noting that the legislative history of [the statute in question] supports the conclusion [we have reached]."

417 F.3d at 388 n. 3. *Santiago* merely demonstrates that in light of ambiguous guidance from the Supreme Court, we covered our bases by including a brief reference to the legislative history.

As we noted in *Santiago*, the Supreme Court referred to legislative history when explaining the

meaning of the Food, Drug and Cosmetic Act in *Brown & Williamson*. *Id.* (citing 529 U.S. at 133, 120 S.Ct. 1291). However, subsequent to *Brown & Williamson*, the Supreme Court returned to its original mode of analysis, which does not include a consideration of legislative history at *Chevron* step one. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, --- U.S. ----, 127 S.Ct. 1534, 1543, 167 L.Ed.2d 449 (2007) ("[N]ormally neither the legislative history nor the reasonableness of the [agency interpretation] would be determinative if the plain language of the statute unambiguously indicated [Congress's intent]."); *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132-33, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous."). Thus, we no longer find it necessary to consider legislative history at *Chevron* step one.

Geiser argues that *Fedorenko*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686, and *Szehinskyj v. Att'y Gen. (Szehinskvj II)*, 432 F.3d 253 (3d Cir.2005), indicate that we should consider legislative history at *Chevron* step one. But these cases, read in their entirety, do not support his argument.

Geiser cites *Fedorenko* to show that the Supreme Court, when deciding whether a concentration camp guard was eligible for a visa under the DPA, took into account the testimony of a foreign service officer who had administered visa applications under the DPA. *Fedorenko*, 449 U.S. at 511, 101 S.Ct. 737. Geiser's reading of *Fedorenko* contains several weaknesses. First, the material the Supreme Court considered in that case was not legislative history, but testimony about agency interpretation of the statute. *Id.* Second, the *Fedorenko* Court relied heavily on the

plain meaning of the language of the DPA. *Id.* at 512, 101 S.Ct. 737. Third, citing *Fedorenko* to explain *Chevron* analysis is a dubious proposition, since *Fedorenko* predates *Chevron* by three years. Even if *Fedorenko* did consider legislative history when initially construing the statute's meaning, this approach was altered by the Supreme Court's *Chevron* jurisprudence, which now controls our analysis of the RRA.

Nor does *Szehinskvj II* support Geiser's argument that we should consider legislative history at *Chevron* step one. The petitioner in *Szehinskyj II* was a former concentration camp guard who had received a visa under the DPA, became a United States citizen, and was later denaturalized. 432 F.3d at 254. After his denaturalization, the INS instituted removal proceedings under the Holtzman Amendment. *Id.* Szehinskyj argued that the legislative history of the Holtzman Amendment showed that it had a different meaning than the DPA despite using the same language ("assisted in persecution"). *Id.* at 255-56. We stated that "[t]he law is what Congress enacts, not *294 what its members say on the floor." *Id.* at 256.

We showed that Szehinskyj had selectively chosen comments from the floor debate that supported his argument. *Id.* at 256-60. We also showed that the floor debate as a whole supported the plain meaning of the statute, which was controlling in any case. *Id.* Our consideration of legislative history illustrated "the perils of appealing to [selected comments from the floor debate] as a guide to statutory meaning;" we rejected Szehinskyj's argument largely because "the statutory language is not ambiguous, and is contrary to [his] interpretation." *Id.* at 256. Therefore, Geiser

is not on solid ground when he reads *Szehinskvj II* as a statement by this Court that legislative history should be considered at *Chevron* step one.

In sum, the current state of Supreme Court and Third Circuit jurisprudence demonstrates that legislative history should not be considered at *Chevron* step one. At step one, a court "must ask . . . whether Congress has directly spoken to the precise question at issue." *Chen*, 381 F.3d at 224 (internal quotation marks and citations omitted). We determine whether Congress has "unambiguously expressed [its] intent," *id.*, by looking at the "plain" and "literal" language of the statute, *Zuni Pub. Sch. Dist.*, 127 S.Ct. at 1543.

The District Court determined, in its *Chevron* step one analysis, that the meaning of RRA § 14(a) ("personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin") was not ambiguous and referred to former concentration camp guards. Therefore, the District Court did not proceed to *Chevron* step two, stating that it did not "reach Geiser's contention that the State Department had in fact adopted a policy of granting RRA visas to former Nazi concentration camp guards who were not war criminals."

Leaving aside the legislative history, which we have shown to be irrelevant at *Chevron* step one, Geiser argues that the text and structure of the RRA are ambiguous.

1. Textual Ambiguity in the RRA

Geiser argues that RRA § 14(a) is silent as to the meaning of the term "persecution," and that the definition of "persecution" is therefore ambiguous. He cites *Chen*, 381 F.3d 221, to support this proposition.

Geiser does not argue that the RRA's use of the word "personally" is ambiguous, but we will address this question as well in order to complete the *Chevron* step one textual analysis. We conclude that the District Court correctly found that there is no textual ambiguity in the RRA.

a. Ambiguity in the Term "Persecution"

The RRA does not define "persecution." RRA § 2 ("Definitions" section, defining "refugee," "escapee," "German expellee," and "Administrator"). However, statutory silence does not prove that a term is ambiguous. *Appalachian States Low-Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 197-98 (3d Cir.1997) (concluding that a statutory term was unambiguous, although it was not defined). When determining a statute's plain meaning, our starting point is "the ordinary meaning of the words used." *Id.* at 197. We refer to standard reference works such as legal and general dictionaries in order to ascertain the ordinary meaning of words. *Id.* (citing Black's Law Dictionary, Webster's Ninth New Collegiate Dictionary, and Webster's Third New International Dictionary).

Webster's second definition of "persecute" is: "to harass in a manner to injure, grieve, or afflict [usually] because of some difference of outlook or opinion [;] set upon with cruelty or malignity [;] . . . to cause to suffer or put to death because of belief (as in a religion). . . ."[1] Webster's Third New International Dictionary 1685 (1981). Black's defines "persecution" as: "Violent, cruel, and oppressive treatment directed

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[1] The first definition, which is not applicable in this case, is: "to follow with the intent of killing, capturing, or harming. . . ." Webster's Third New International Dictionary 1685 (1981).

toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs." Black's Law Dictionary 1178 (8th ed.2004).

In a case involving the denaturalization of a former Nazi, we defined "persecution" in a manner that is substantively identical to these definitions. *United States v. Koreh*, 59 F.3d 431, 440 (3d Cir.1995). We said that persecution is "the infliction of sufferings, harm, or death on those who differ . . . in a way regarded as offensive or meriting extirpation[;] a campaign having for its object the subjugation or extirpation of the adherents of a religion." *Id.* (internal quotation marks and citations omitted).

Under these definitions, the experiences of prisoners at Nazi concentration camps fit squarely within the plain meaning of "persecution." Thus, the meaning of "persecution" is not ambiguous, even though the statute does not define the term. Indeed, Geiser concedes that Sachsenhausen and Buchenwald were "places of persecution." This admission forecloses his argument that "persecution" is an ambiguous term in the context of this case, because even if it is, he agrees that the concentration camps where he was a guard were places of persecution.

Geiser nevertheless argues that Chen demonstrates that the term "persecution" is ambiguous. In Chen, we considered which individuals are entitled to refugee status based on past experiences of forced abortion and sterilization. 381 F.3d at 223. According to a 1996 statute, coercive population control programs constitute persecution. *Id.* at 224-25. The BIA interpreted the statute to allow women affected by those programs, as well as their husbands, to make claims of persecution. *Id.* at 227. Chen argued that the definition of "persecution" should be expanded to

include the fiancé of a woman who had experienced forcible abortion or sterilization, but we disagreed. *Id.* at 229. In the course of our analysis, we made the following point, upon which Geiser relies:

> "[W]ith the exception of forced abortions and sterilizations, the concept of 'persecution' is left completely undefined. We infer from Congress's use of this ambiguous term an intent to delegate interpretive authority to the agency, including the ability to decide, within a reasonable range, the precise contours of its meaning."

Id. at 232. It is important to note that in Chen, we spoke of the agency's authorization to regulate within the "reasonable range" specified by the statutory language. *Id.* We reiterated this point later in the opinion:

> "[T]here is no indication that Congress intended to put limits on the meaning of the term 'persecution' beyond those imposed by the normal understanding of the word. *Matter of Acosta*, 19 I & N Dec. 211, at 223 (BIA 1985). ('Congress chose not to define the word "persecution" . . . because the meaning of the word was understood to be well established by administrative and court precedents.')."

Id. at 233.

In *Chen*, the petitioner was attempting to show that the concept of "persecution" should be expanded to include the fiancés of women who were victims of coercive population control programs. *Id.* at 223. It was logical to discuss the ambiguity in a term like "persecution," which in the context of Chen applied to some individuals and not others. Geiser's case, on the other hand, does not stretch the boundaries of the

concept of "persecution." What occurred in Nazi concentration camps rests within the plain meaning of the word. Thus, *Chen*'s discussion of the ambiguity of the term "persecution" is inapplicable to the concentration camp context.

In *Fedorenko*, the Supreme Court recognized that persecution has a basically unambiguous meaning, but potentially ambiguous boundaries. 449 U.S. at 511 n. 3, 101 S.Ct. 737. *Fedorenko* parallels Geiser's case to a large extent, except that *Fedorenko* obtained his visa under the DPA rather than the RRA. *Id.* at 496-97, 101 S.Ct. 737. The District Court refused to denaturalize *Fedorenko* because it found that he had not voluntarily assisted in persecution. *Id.* at 511 n. 33, 101 S.Ct. 737. The District Court read this voluntariness requirement into the statute because it believed that otherwise, it would be constrained to denaturalize Jewish survivors of Treblinka who had involuntarily "assisted . . . in persecution" by, for example, cutting other prisoners' hair before their execution. *Id.*

The Supreme Court laid to rest the District Court's fears by pointing out that the term "persecution" can be ambiguous. *Id.* at 512 n. 34, 101 S.Ct. 737. The Court stated that "an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians." *Id.* In other words, "persecution" is ambiguous when applied to a prisoner forced to assist in concentration camp operations, but it is not ambiguous when applied to an armed camp guard. *Id.* On the basis of this reasoning, the Supreme Court concluded that *Fedorenko*'s citizenship must be revoked. *Id.* at 518, 101 S.Ct. 737.

Thus, the Supreme Court and this Court have both acknowledged that the term "persecution" has gray boundaries where ambiguity may legitimately be found. *Id.*; *Chen*, 381 F.3d at 232. However, these cases also recognize that certain conduct (guarding a concentration camp or forcing a woman to undergo an abortion) falls squarely within the definition of "persecution." Geiser's case presents an example of such conduct.[2] It cannot be rationally argued that prisoners at Sachsenhausen and Buchenwald were not persecuted within the plain meaning of that term. Therefore, the text of the RRA is not ambiguous due to the use of the term "persecution."

b. Ambiguity in the Term "Personally"

The Supreme Court and this Court have held that according to the plain meaning of the DPA, any armed concentration camp guard "advocated or assisted in persecution." *Fedorenko*, 449 U.S. at 509, 101 S.Ct. 737 ("[D]isclosure of the true facts about petitioner's service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the DPA."); *Szehinskyj I*, 277 F.3d at 339 ("It is clear that personal participation in atrocities is not required for one to have assisted in persecution-being an armed concentration camp guard is sufficient." (citing *Fedorenko*, 449 U.S. at 512, 101 S.Ct. 737)).

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[2] Geiser's Answer to the Government's Complaint denies "that [he] personally assisted the Nazi government . . . in persecuting any persons. . . . To the contrary, to the limited extent possible in the context of a brutal military organization, [Geiser] attempted to aid and assist [the] victims of persecution." However, service as an armed concentration camp guard, without further participation in atrocities, is sufficient to constitute assistance in persecution. *Fedorenko v. United States*, 449 U.S. 490, 512 n. 34, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981).

Since these cases establish that armed concentration camp guards "advocated or assisted in persecution," we must determine whether the RRA's inclusion of the word "personally" (which did not appear in the DPA) requires a different result.[3] This is an issue of first impression for our Court.

As required by *Chevron* step one, we must decide whether the term "personally" in the text of RRA § 14(a) is ambiguous. We must determine whether Congress has "directly spoken to the precise question at issue," *Chen*, 381 F.3d at 224, by looking at the "plain" and "literal" language of the statute, *Zuni Pub. Sch. Dist.*, 127 S.Ct. at 1543. The precise question at issue is whether an armed concentration camp guard who is not shown to have committed atrocities nevertheless "personally advocated or assisted in . . . persecution." RRA § 14(a).

Webster's defines "personal" as: "[O]f or relating to a particular person . . . [;] done in person without the intervention of another. . . ." Webster's Third New International Dictionary 1686 (1981). It defines "personally" as: "[S]o as to be personal[;] in a personal manner; . . . as oneself[;] on or for one's own part." *Id.* at 1687. Black's defines "personal" as: "Of or affecting a person." Black's Law Dictionary 1179 (8th ed.2004). Therefore, the plain meaning of "personally advocated or assisted in the persecution of any person" is that an individual, by his own actions performed in person, advocated or assisted in persecution.

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[3] The DPA provided that visas would not be issued to anyone "who advocated or assisted in the persecution of any person." *United States v. Szehinskyj (Szehinskyj I)*, 277 F.3d 331, 334 (3d Cir.2002). The RRA provided that visas would not be issued to "any person who personally advocated or assisted in the persecution of any person or group of persons." RRA § 14(a).

Geiser's conduct as an SS guard fits the plain meaning of "personally advocated or assisted in . . . persecution." Geiser stood watch at the perimeter of the concentration camps with instructions to fire his rifle if a prisoner tried to escape. Thus, his personal actions assisted in keeping the prisoners confined in the camps where they were persecuted. In addition, he marched prisoners to and from their work sites, and these personal actions assisted in coercing the prisoners into performing forced labor.

We find support for our conclusion in the opinions of our sister Courts of Appeals, which have concluded that "personally advocated and assisted in . . . persecution" describes the actions of any concentration camp guard. In *United States v. Hansl*, the Court of Appeals for the Eighth Circuit concluded that:

> "Hansl's admitted conduct as a member of the Death's Head Battalion, guarding the perimeters of concentration camps while armed, issuing orders, and threatening to shoot anyone who attempted to leave a concentration camp is more than sufficient to meet the common definition of personally assisting in the persecution of a group of persons based on their race, religion, or national origin."

439 F.3d 850, 854 (8th Cir.2006). The Court of Appeals for the Seventh Circuit reached the same result in *United States v. Kumpf*: "While the precise parameters of personal assistance under the [RRA] have not been delineated by the courts, Kumpf's own actions [as a concentration camp guard] clearly constitute personal assistance in persecution." 438 F.3d 785, 790 (7th Cir. 2006).

We conclude, as have other Courts of Appeals, that according to the plain meaning of the RRA, concentration camp guards "personally advocated or assisted in . . . persecution." RRA § 14(a). Although Geiser attempts to argue that the RRA is textually ambiguous at *Chevron* step one, the meaning of the statute is clear. Therefore, the District Court correctly refused to proceed to *Chevron* step two.

2. Structural Ambiguity in the RRA

Geiser argues that the structure of the RRA demonstrates that the statute is ambiguous. Statutory structure is properly considered under *Chevron* step one. *Zheng*, 422 F.3d at 115-16. However, the structure of the RRA does not create ambiguity as to its meaning.

The RRA provides that individuals must establish "eligibility for a visa and . . . admissibility into the United States under this Act and under the immigration laws and regulations." RRA § 11(c). Thus, any individual who received a visa under the RRA was also subject to the requirements of the Immigration and Nationality Act of 1952("INA"). Section 104 of the INA provided that aliens should be excluded if, among other things, they had been members of a "totalitarian party" or would engage in "activity subversive to the national security." INA § 212(a)(28), (29).

The State Department issued regulations interpreting the INA, among them 22 C.F.R. § 42.42. This regulation provided that an alien was inadmissible if he "was guilty of, or . . . advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf a power which was at war with the United States during World War II." 22 C.F.R. § 42.42(j)(2).

Geiser posits that the admissibility of former concentration camp guards could be determined by looking at RRA § 14, by looking at 22 C.F.R. § 42.42(j) and its interpretive materials, or by looking at the State Department's interpretations of the immigration laws as a whole. He argues that because there are multiple ways to interpret the RRA's structure, the statute is ambiguous.

These three interpretations of the structure of the RRA are unconvincing. It is not clear how the admissibility of former camp guards could be governed only by the RRA when the RRA specifically incorporates the requirements of the INA. Conversely, it would not make sense for admissibility to be governed only by the INA and its associated regulations when Geiser's visa was issued under the RRA.

Geiser's proffered interpretations of the RBA's structure do not include the most natural reading of the statute, which is that the word "and" is used in its plain conjunctive sense. *Reese Bros., Inc. v. United States*, 447 F.3d 229, 236 (3d Cir. 2006) ("The usual meaning of the word 'and' . . . is conjunctive, and unless the context dictates otherwise, the land' is presumed to be used in its ordinary sense.") (internal quotation marks and citation omitted). RRA § 11(c) states that applicants must demonstrate their eligibility "under this Act and under the immigration laws and regulations." Nothing in this context dictates that we should abandon our usual presumption about the meaning *299 of "and." In RRA § 11(c), "and" signifies that applicants such as Geiser had to meet two sets of requirements: those of the INA (and its associated regulations) and those of the RRA.

Thus, Geiser's argument—that the RRA is structurally ambiguous-fails.[4]"

Despite Geiser's effort to unearth ambiguity in the structure of the RRA, none exists. The District Court properly declined to proceed to *Chevron* step two in order to discern the meaning of the RRA.

III. CONCLUSION

We conclude that the District Court properly granted the Government's motion for summary judgment. There is neither textual nor structural ambiguity in RRA § 14(a), so *Chevron* step two analysis is unnecessary. As an armed concentration camp guard in World War II, Geiser "personally advocated or assisted in the persecution of [a] . . . group of persons because of race, religion, or national origin." RRA § 14(a). Therefore, we will affirm the District Court's order granting the Government's motion for summary judgment and revoking Geiser's citizenship.

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[4] In cases involving former concentration camp guards, the Courts of Appeals for the Seventh and Eighth Circuits have also interpreted RRA § 11(c) to use "and" in its ordinary conjunctive sense. Each of those courts analyzed the former guard's admissibility under the RRA, without reference to the INA or its attendant regulations. *United States v. Hansl*, 439 F.3d 850 (8th Cir.2006); *United States v. Kumpf*, 438 F.3d 785 (7th Cir.2006). If the word "and" carries its plain conjunctive meaning, the government only needs to show that an individual failed to meet the requirements of the RRA or the INA, because an individual who fails to meet either set of requirements does not qualify under the RRA "and" the INA.

APPENDIX C

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

No. 06-4406

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTON GEISER,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 04-cv-01184)
District Judge: Honorable David S. Cercone

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and ROTH,* *Circuit Judges.*

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other avail-

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* Judge Roth's vote is limited to panel rehearing only.

able circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher
D. MICHAEL FISHER
Circuit Judge

Dated: August 20, 2008

tmm/cc: Valerie M. Antonette, Esq.
Samuel J. Reich, Esq.
Jay K. Reisinger, Esq.
Adrain N. Roe, Esq.
Christina Giffin, Esq.

APPENDIX D

STATUTES AND REGULATIONS

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, Ch. 477, 66 Stat 163 ("INA").

Sec. 104. (a) The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas . . . .

(b) There is hereby established in the Department of State a Bureau of Security and Consular Affairs . . . .

(c) Within the Bureau there shall be a . . . Visa Office . . . . The Director[] of the . . . Visa Office shall be experienced in the administration of the nationality and immigration laws.

(e) There shall be a General Counsel of the Visa Office . . . . The General Counsel shall have authority to maintain liaison with the appropriate officers of the Service with a view to securing uniform interpretations of the provisions of this Act.

Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States.

(29) Aliens with respect to whom the consular officer or the Attorney General knows

or has reasonable ground to believe probably would, after entry (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage public disorder, or in other activity subversive to the national security . . . .

Sec. 316. (a) No person . . . shall be naturalized, unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence . . . .

Sec. 340. (a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, amended by, Pub. L. No. 83-751, 68 Stat. 1053 (1954) ("RRA").

Sec. 2. (a) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity, or military operations is out of his usual place of abode and unable to return thereto . . . .

(c) "German expellee" means any refugee of German ethnic origin residing in . . . Austria

who was born in and forcibly removed from or forced to flee from . . . Yugoslavia . . . .

Sec. 3. There are hereby authorized to be issued two hundred five thousand special nonquota immigrant visas . . . .

Sec. 4. (a) Special nonquota immigrant visas authorized to be issued under section 3 of this Act shall be allotted as follows:

(1) Not to exceed fifty-five thousand visas to German expellees residing in . . . Austria: Provided, That the visas issued under this paragraph shall be issued only in . . . Austria.

Sec. 7. (b) Any alien admitted under this Act and subsequently determined to have been inadmissible under the provisions of this Act at the time of entry shall, irrespective of the date of his entry, be taken into custody and deported . . . .

Sec. 11. (a) No alien shall be issued a visa under this Act or be admitted into the United States unless there shall first have been a thorough investigation . . . .

(b) No person shall be issued a visa or be admitted into the United States under this Act if . . . ineligible for a visa . . . under any provision of the immigration laws or under the terms of this Act.

(c) No person shall be issued a visa . . . under this Act unless . . . the applicant has established his eligibility for a visa . . . under this Act and under the immigration laws and regulations . . . .

Sec. 14. (a) No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.

Sec. 15. Except as otherwise expressly provided by this Act all of the provisions of the Immigration and Nationality Act (66 Stat. 163) shall be applicable under this Act.

22 C.F.R. § 42.42(j) (1953).

§ 42.42 *Classes of aliens ineligible to receive immigrant visas* . . . .

(j)(2) *Subversive activity.* The provisions of section 212(a)(29) of this act shall be considered to relate to the ineligibility of aliens to receive visas on the basis of their past activities which indicate that they probably would engage, after arrival in the United States, in one or more of the activities specified in section 212(a) (29), regardless of their actual or ostensible purposes, plans, intentions or designs in coming to the United States. An alien who was convicted of being a war criminal, or who was properly charged as such but who escaped trial or punishment by departing the jurisdiction, or an alien who was guilty of, or who advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of a power which was at war with the United States during World War II may be considered ineligible to receive a visa under the provisions of section 212(a)(29) of the act.